No. 96-113

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,
Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the entry of a now-expired preliminary injunction, under 28 U.S.C. § 1446(d), on the ground that the injunction was necessary to prevent Petitioner's attempt to subvert the removal jurisdiction of the District Court under 12 U.S.C. § 1441a(*l*).

LIST OF PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed by the petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Shook, Hardy & Bacon has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
1. Background	1
2. Procedural History	2
3. The District Court's Rulings	5
4. The Eighth Circuit's Decision	5
5. Subsequent District Court Proceedings	7
REASONS FOR DENYING THE WRIT	8
I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S JURISDICTIONAL CHALLENGE TO THE PRELIMINARY INJUNCTION WAS BASED NOT ON 28 U.S.C. § 1367 BUT RATHER ON A CORRECT INTERPRETATION OF 12 U.S.C. § 1441a(*l*)	8
II. THERE IS NO CIRCUIT SPLIT CONCERNING 28 U.S.C. § 1367	8
III. CONTRARY TO PETITIONER'S ASSERTION, THE COURT CONSIDERED THE *YOUNGER* ABSTENTION DOCTRINE AND CORRECTLY HELD THAT IT DID NOT REQUIRE REMAND	10
IV. THERE IS NO CIRCUIT SPLIT CONCERNING THE DISTRICT COURT'S POWER UNDER 28 U.S.C. § 1446(d)	11

TABLE OF CONTENTS—Continued

Page

V. PETITIONER SEEKS INTERLOCUTORY REVIEW OF A NOW-EXPIRED PRELIMINARY INJUNCTION, AND THE ISSUES IT SEEKS TO RAISE WOULD BE BEST PRESENTED ON CERTIORARI FROM APPEAL OF THE FINAL JUDGMENT 12

CONCLUSION 14

APPENDICES

APPENDIX A

Order of final judgment and Memorandum Order granting final judgment and permanent injunction, United States District Court for the Western District of Missouri, dated July 22, 1996 ..... 1a

APPENDIX B

"Form A" filed in United States Court of Appeals for the Eighth Circuit in *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., et al.*, No. 96-3317WMKC, dated August 19, 1996 ..... 7a

APPENDIX C

Notice of Appeal from final judgment entered by United States District Court for the Western District of Misscuri, dated August 20, 1996 ..... 8a

TABLE OF AUTHORITIES

CASES — Page

Brown v. Seaboard C.L. R.R. Co., 309 F. Supp. 48 (N.D. Ga. 1969) 11
Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) 6
Doe v. District of Columbia, No. 95-7077, 1996 WL 480414 (D.C. Cir. Aug. 27, 1996) 10
Estelle v. Gamble, 429 U.S. 97 (1976) 12
Executive Software N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994) 10
FSLIC v. Griffin, 935 F.2d 691 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992) 8
Faulkner v. Jones, 116 S. Ct. 331 (1995) 13
Fischman v. Fischman, 470 F. Supp. 980 (E.D. Pa. 1979) 11
Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1975) 11
KPERS v. Reimer & Koger Assocs., Inc., 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994) 3
KPERS v. Reimer & Koger Assocs., Inc., 60 F.3d 1304 (8th Cir. 1995) 2
KPERS v. Reimer & Koger Assocs., Inc., 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996) 4
KPERS v. Reimer & Koger Assocs., Inc., 77 F.3d 1063 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 ..... *passim*
LaShawn A. v. Barry, 87 F.3d 1389 (D.C. Cir. 1996) 9
Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 11
Madison Square Garden Boxing, Inc. v. Shavers, 562 F.2d 141 (2d Cir. 1977) 13
Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) 9
Moore v. Ogilvie, 394 U.S. 814 (1969) 13
Myers v. County of Lake, 30 F.3d 847 (7th Cir.), *cert. denied*, 115 S. Ct. 666 (1994) 10

TABLE OF AUTHORITIES—Continued

	Page
Myers v. Hertz Penske Truck Leasing, Inc., 572 F. Supp. 500 (N.D. Ga. 1983)	11
PAS v. Travelers Ins. Co., 7 F.3d 349 (3d Cir. 1993)	10
Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305 (1977)	13
Pacificare, Inc. v. Burrage, 59 F.3d 151 (10th Cir. 1995)	10
Palmer v. Hospital Auth., 22 F.3d 1559 (11th Cir. 1994)	10
Reliable Transfer Co. v. Gallahar, 54 F. Supp. 395 (S.D. Ga.), *aff'd*, 145 F.2d 551 (5th Cir. 1944)	12
Thomas v. LTV Corp., 39 F.3d 611 (5th Cir. 1994)	10
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	6, 9
United States v. Johnston, 268 U.S. 220 (1925)	12
Younger v. Harris, 401 U.S. 37 (1971)	6, 11
STATUTES	
H.R. Rep. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6802	9
12 U.S.C. § 1441a(*l*)	*passim*
12 U.S.C. § 1441a(m)	8
28 U.S.C. § 1367	5, 6, 8, 9, 10
28 U.S.C. § 1446(d)	7, 11
TREATISES	
Robert L. Stern *et al.*, *Supreme Court Practice* (7th ed. 1993)	13

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BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

STATEMENT OF THE CASE

1. Background

Petitioner Kansas Public Employees Retirement System ("KPERS") seeks review of a decision of the Court of Appeals for the Eighth Circuit affirming a preliminary injunction barring KPERS, which had two identical suits pending in the District Court against respondent Shook, Hardy & Bacon ("Shook Hardy") on claims arising from KPERS' investments in Home Savings Association, F.A. ("Home Savings"), from filing more suits against the law firm on the same claims. The District Court granted the injunction based, *inter alia*, on the undisputed finding that the reason for KPERS' filing of additional suits was to

circumvent an Eighth Circuit ruling on the applicable statute of limitations. Pet. App. at 18a, 22a, 28a, 31a.[1]

The preliminary injunction has expired because the District Court entered a final judgment, including a permanent injunction, in favor of the defendants on July 22, 1996. Opp. App. at 1a-6a. KPERS has noticed an appeal from the judgment, including the permanent injunction, to the Eighth Circuit. Opp. App. at 7a-9a.

2. Procedural History

In this case, KPERS sued the former directors of Home Savings and a number of professional firms for losses arising from investments KPERS made in Home Savings in 1986. *See* Pltf. App. at 98 (Docket entry 537). The suit was initially filed in Kansas state court in 1991 naming the directors of Home Savings (hereinafter "the Home Savings defendants"), KPERS' outside investment advisor, and certain other parties as defendants. Pltf App. at 6 (Docket entry, 6/5/91). The claims asserted by KPERS are "conventional" common law or statutory tort and contract claims seeking money damages only. *See KPERS v. Reimer & Koger Assocs., Inc. (KPERS II)*, 60 F.3d 1304, 1306 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc. (KPERS IV)*, 77 F.3d 1063, 1071 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 17, 1996) (No. 96-113), Pet. App. at 13a; Pltf. App. at 98 (Docket entry 537, Sixth Amended Complaint). KPERS' claims against Shook Hardy are for negligent misrepresentation, breach of fiduciary duty,

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[1] As used in this brief, "Pet. App." refers to KPERS' appendix to its Petition for Writ of Certiorari; "Opp. App." refers to the appendix to Shook Hardy's Opposition to KPERS' Petition; "Pltf. App." refers to the appendix to KPERS' brief in the Eighth Circuit; and "Def. App." refers to the appendix to Shook Hardy's brief in the Eighth Circuit.

and participation in breach of fiduciary duty. Pltf. App. at 98 (Sixth Amended Complaint).[2]

On March 17, 1992, the Home Savings defendants filed a motion to dismiss KPERS' claims in lieu of answering KPERS' complaint. Pltf. App. at 22 (Docket entries, 3/17/92). On May 13, 1992, the Resolution Trust Corporation ("RTC") as successor-in-interest to Home Savings moved to intervene in the case. Pltf. App. at 26 (Docket entry, 5/13/92). While the RTC's motion to intervene was pending, the state court denied the Home Savings defendants' motion to dismiss KPERS' petition. Pltf. App. at 28 (Docket entry, 8/21/92). The Home Savings defendants then filed an answer which included a third-party petition naming the RTC a third-party defendant in the case. Pltf. App. at 30 (Docket entries, 10/2/92).

On October 13, 1992, the RTC removed KPERS' lawsuit to federal court in Kansas City, Missouri, the location of Home Savings, pursuant to 12 U.S.C. § 1441a(*l*)(3)(A), the RTC removal provision. Pltf. App. at 47 (Docket entry 1). Once the case was removed, KPERS sought remand of its claims to state court. Pltf. App. at 47 (Docket entry 7). The District Court denied remand, and that decision was affirmed by the Eighth Circuit. *KPERS v. Reimer & Koger Assocs., Inc. (KPERS I)*, 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994). The RTC was subsequently dismissed as a third-party defendant, Pltf. App. at 565-68, and the District Court again declined to remand the case to Kansas state court. Pltf. App. at 760-71, 769-70. KPERS did not seek interlocutory review of that decision. Pet. App. at 5a.

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[2] In an attempt to fit within doctrines of abstention articulated by this Court, KPERS mischaracterizes its lawsuit as one involving "civil fraud claims . . . pursued in lieu of a criminal prosecution." Pet. at 3, 4, 14. In fact, KPERS has never alleged fraud or any other intentional wrongdoing by Shook Hardy that would support a criminal prosecution.

The case proceeded through the completion of fact discovery, and a trial date was set for January 1996. Pltf. App. at 80 (Docket entry 353). On July 27, 1995, the Eighth Circuit reversed a ruling by the District Court on the statute of limitations applicable to KPERS' claims. *KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996). The effect of this ruling was to subject KPERS' claims to the general two- and three-year Kansas statutes of limitation for tort and statutory claims. In the wake of this decision, KPERS began what the District Court subsequently found to be a campaign to delay the progress of this case by, among other means, filing repetitive state court lawsuits against the same defendants on the same claims that had been pending in the District Court since 1992. Def. App. at 40; Pet. App. at 27a-29a; Pltf. App. at 788, 865, 895.

KPERS' new lawsuits against Shook Hardy and certain of the other defendants were filed in the District Court of Shawnee County, Kansas, on August 23, 1995. *See* Pltf. App. at 788, 865, 895. KPERS' counsel publicly admitted that the new lawsuits were prompted by what KPERS regarded as an "erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations." Def. App. at 09-10; Pet. App. at 4a-5a. The District Court later found that KPERS' new claims were "substantially the same, if not identical" to the claims in the initial action, Pet. App. at 22a, 5a, and that KPERS' repeated filing of duplicative lawsuits was intended to "undercut" the purpose of the RTC removal statute, 12 U.S.C. § 1441a (*l*)(1). Pet. App. at 18a-19a, 29a-30a.

Shook Hardy answered the new state court petition and filed a third-party claim for indemnity against the RTC. Pltf. App. at 1064-92; Pet. App. at 4a. The RTC then elected to remove the new lawsuit to the United States District Court for the Western District of Missouri on September 12, 1995. Pltf. App. at 1378-83; Pet. App. at 4a. That new lawsuit remains pending in the District Court.

3. The District Court's Rulings

On September 13, 1995, Shook Hardy moved for a temporary restraining order and, together with certain other parties, for a preliminary injunction barring KPERS from filing *additional* state court lawsuits against it arising out of the Home Savings investment. Pltf. App. at 1461-526; Pet. App. at 4a. The District Court granted Shook Hardy's motion for a temporary restraining order on September 14, 1995, after KPERS refused to agree that it would not file new state court actions against Shook Hardy in the period before the preliminary injunction motions could be heard. Def. App. at 13-16, 23-28; Pltf. App. at 1783-86. Following a hearing on September 28, 1995, the District Court entered a preliminary injunction prohibiting KPERS from pursuing separate state court actions against Shook Hardy and the other moving defendants. Pet. App. at 21a-32a.

The District Court rejected an attack by KPERS on the federal court's jurisdiction over the case following dismissal of the third party claims against the RTC, holding that (i) the District Court had "arising under" jurisdiction over the entire case under 12 U.S.C. § 1441a, and (ii) in any event, it was appropriate to continue to exercise supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367(c). Def. App. at 38-43.

4. The Eighth Circuit's Decision

On appeal, KPERS devoted little attention to the propriety of the preliminary injunction, occupying itself primarily with its attack on the District Court's exercise of supplemental jurisdiction, which KPERS argued was contrary to federal abstention principles and an abuse of discretion under the supplemental jurisdiction statute, 28 U.S.C. § 1367. Pet. App. at 5a.

The Eighth Circuit found KPERS' arguments assailing the District Court's supplemental jurisdiction to be mis-

placed because they ignored the District Court's alternative ruling that it had jurisdiction over KPERS' claims based on the RTC's removal under 12 U.S.C. § 1441a (*l*)(1). Pet. App. at 5a-6a. The Eighth Circuit affirmed this holding, which was dispositive of KPERS' jurisdictional arguments. *Id.* The court nevertheless proceeded to address KPERS' arguments concerning supplemental jurisdiction and abstention. *Id.* at 6a-14a.

Thus, in an alternative holding, the Eighth Circuit stated that it did not need to decide whether the District Court abused its discretion under § 1367(c) by retaining jurisdiction over KPERS' claims after the RTC was dismissed in order to determine if the District Court possessed jurisdiction to issue the injunction. Pet. App. at 6a-7a. Applying this Court's decisions in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), the court held that the District Court obtained supplemental jurisdiction over KPERS' claims when the RTC removed them to federal court, and it retained supplemental jurisdiction even after the RTC was dismissed as a party. Pet. App. at 6a-7a. Whether the District Court abused its discretion by keeping the case after the RTC was no longer a party could not affect the underlying *jurisdiction* of the District Court, which was determined at the time of removal. *Id.*

The Eighth Circuit found no merit to KPERS' argument that the District Court was required to abstain from hearing KPERS' claims under the principles of *Younger v. Harris*, 401 U.S. 37 (1971). The court held that because the District Court had exclusive jurisdiction over KPERS' claims pursuant to 12 U.S.C. § 1441a(*l*), it would have been inappropriate for it to abstain from hearing those claims.

KPERS also argued on appeal that the District Court lacked authority to issue the injunction. The Eighth Cir-

cuit rejected this argument and affirmed the authority of the District Court to issue the injunction under 28 U.S.C. § 1446(d) and the RTC removal provision, 12 U.S.C. § 1441a(*l*). Pet. App. at 7a-14a & n.6. Specifically, the court found that district courts are empowered under these provisions to enjoin duplicative state proceedings that are filed to subvert the purposes of the removal statute, which is what the District Court found KPERS had already attempted to do and would attempt again absent an injunction. *Id.* The court held that the RTC removal statute was intended "to provide a federal forum for the entirety of any case to which the RTC is a party at the time of removal. To permit KPERS to circumvent this goal by prosecuting a competing suit in state court would therefore subvert the purpose of the RTC removal statute." *Id.* at 12a.

5. Subsequent District Court Proceedings

Since the Eighth Circuit affirmed the District Court's issuance of the preliminary injunction, the District Court has dismissed KPERS' claims against all of the defendants as barred by the applicable statutes of limitations and entered a final judgment for the defendants in the case. *See* Opp. App. at 1a-2a (Order of June 3, 1996 and Order of Final Judgment of July 22, 1996, filed in *KPERS v. Reimer & Koger Assocs., Inc. et al.*, No. 92-0922-CV-W-9 (W.D. Mo.)). As part of the final judgment, the District Court also granted the defendants' request for a permanent injunction superseding the preliminary injunction in effect during the pendency of the District Court proceedings. Opp. App. at 1a-6a. KPERS has taken an appeal from the final judgment and has raised the propriety of the permanent injunction as an issue on appeal. Opp. App. at 7a-9a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' REJECTION OF PETITIONER'S JURISDICTIONAL CHALLENGE TO THE PRELIMINARY INJUNCTION WAS BASED NOT ON 28 U.S.C. § 1367 BUT RATHER ON A CORRECT INTERPRETATION OF 12 U.S.C. § 1441a(*l*).

Petitioner's primary challenge to the preliminary injunction was an argument that the District Court lacked jurisdiction over the case under 28 U.S.C. § 1367(c) after the third-party complaint against the RTC was dismissed. Despite Petitioner's extraordinary attempt to disguise it, the primary basis of the Court of Appeals' holding that the District Court continued to have jurisdiction after the RTC's dismissal was not 28 U.S.C. § 1367, but 12 U.S.C. § 1441a(*l*). The Court of Appeals held that under § 1441a(*l*), "the federal court has arising-under, rather than supplemental, jurisdiction even over the claims that do not involve the RTC." Pet. App. at 6a.

Section 1441a(*l*) was a statute that dealt specifically and exclusively with cases involving the RTC. The RTC, however, went out of existence on December 31, 1995, 12 U.S.C. § 1441a(m), and its removal statute effectively became a nullity at that time. Thus, even if the Court of Appeals' reliance on § 1441a(*l*) were questionable, there would be nothing to gain from Supreme Court review of that issue.[3]

II. THERE IS NO CIRCUIT SPLIT CONCERNING 28 U.S.C. § 1367.

Even assuming that 28 U.S.C. § 1367 governed the issue, the Court of Appeals' holding that the District Court's jurisdiction survived the RTC's dismissal was correct, and there is no split of authority on that issue.

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[3] In any event, the Court of Appeals' reliance on § 1441a(*l*) was correct. *See, e.g., FSLIC v. Griffin*, 935 F.2d 691, 695-96 (5th Cir. 1991) (holding, under similar FDIC removal statute, that "federal question jurisdiction exist[ed]" even after the dismissal of the FDIC), *cert. denied*, 502 U.S. 1092 (1992).

Petitioner attempts to create a circuit split based on two cases, *Maguire v. Marquette Univ.*, 814 F.2d 1213 (7th Cir. 1987), and *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996) (en banc). Petitioner asserts that these cases conflict with the Eighth Circuit's holding that it had no obligation to consider whether the District Court's retention of jurisdiction was an abuse of discretion under 28 U.S.C. § 1367(c) because the District Court had the power to hear the case—i.e., jurisdiction—even if it abused its discretion in exercising that power.[4]

Neither *Maguire* nor *Barry* was decided under § 1367, however. Both preceded the effective date of that provision and were decided under pre-existing decisional law. To any extent that these cases supported Petitioner's theory,[5] they have been superseded by the clear language of § 1367(c), which provides that a "district court *may* decline to exercise supplemental jurisdiction over a claim" if certain circumstances exist, including situations where the district court has dismissed all claims over which it had original jurisdiction. *See* 28 U.S.C. § 1367(c)(3) (emphasis added). Of course, if the issue were jurisdictional, Congress would have *required* a district court to dismiss or remand where the conditions specified in § 1367(c) are present. That it did not do so shows beyond doubt that the discretionary element of supplemental jurisdiction is *not* jurisdictional.[6]

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[4] If the issue was not jurisdictional, it was not properly before the Court of Appeals. Petitioner did not appeal from the District Court's decision not to remand the case following the RTC's dismissal. Pet. App. at 5a.

[5] It would be difficult to imagine a case that more squarely rejects Petitioner's theory than does *Barry*. The *Barry* court held that "the second step of the *Gibbs* analysis," namely, the issue (now codified in § 1367(c)) of whether a district court should exercise its discretion to hear pendent claims, *"is not a jurisdictional determination."* 87 F.3d at 1396 (emphasis supplied).

[6] The legislative history confirms this. *See* H.R. Rep. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6802, 6875 (Section 1367(c)

Petitioner has identified no case that has interpreted § 1367 any differently than did the Eighth Circuit. There is, therefore, no circuit split. In fact, the courts of appeals have frequently confronted the issue and uniformly agree with the Eighth Circuit that § 1367(c) is not jurisdictional. *See Doe v. District of Columbia*, No. 95-7077, 1996 WL 480414 (D.C. Cir. Aug. 27, 1996); *Myers v. County of Lake*, 30 F.3d 847, 849-50 (7th Cir.), *cert. denied*, 115 S. Ct. 666 (1994);[7] *Pacificare, Inc. v. Burrage*, 59 F.3d 151, 152-53 (10th Cir. 1995); *Thomas v. LTV Corp.*, 39 F.3d 611, 615 (5th Cir. 1994); *Executive Software N. Am., Inc. v. United States Dist. Ct.*, 24 F.3d 1545, 1549 (9th Cir. 1994); *Palmer v. Hospital Auth.*, 22 F.3d 1559 (11th Cir. 1994); *PAS v. Travelers Ins. Co.*, 7 F.3d 349, 352 (3d Cir. 1993).

In sum, there is no controversy concerning § 1367 that requires resolution by this Court.

III. CONTRARY TO PETITIONER'S ASSERTION, THE COURT CONSIDERED THE *YOUNGER* ABSTENTION DOCTRINE AND CORRECTLY HELD THAT IT DID NOT REQUIRE REMAND.

As part of its jurisdictional challenge to the preliminary injunction, Petitioner argued that the District Court was required to abstain from exercising federal jurisdiction and

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"codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, *even though it is empowered to hear the claim.*" (emphasis supplied)).

[7] *Myers* precludes any possible argument that *Maguire* is still good law in the Seventh Circuit. *Maguire* characterized as jurisdictional what it called the Gibbs "rule" that pendent claims should be dismissed or remanded when the federal claims are dismissed prior to trial. In *Myers*, the federal claims were dismissed prior to trial, yet the Court of Appeals held that there was no lack of subject-matter jurisdiction. Likewise, *Doe* eliminates any possible argument that the District of Columbia Circuit would adhere to *Maguire*. In *Doe*, too, the federal claims were dismissed, but the Court of Appeals held that jurisdiction remained.

instead to remand the case to state court, citing *Younger v. Harris*, 401 U.S. 37 (1971). Contrary to Petitioner's representations, the Court of Appeals did not treat the *Younger* abstention doctrine as "simply irrelevant." To the contrary, the Court of Appeals considered *Younger* abstention and held that it did not require remand. Pet. App. at 13a-14a. That holding was correct.

First, Petitioner's contention that *Younger* was applicable because "the respondents' alleged fraud" (Pet. at 14) could have been criminally prosecuted is entirely wrong. Respondent Shook Hardy was not alleged to have committed any fraud; the claims against it were limited to allegations of negligence. Second, as the Eighth Circuit correctly held, Pet. App. at 13a-14a, *Younger* abstention is not applicable in cases of exclusive federal jurisdiction. Here, the District Court had exclusive jurisdiction under 12 U.S.C. § 1441a(*l*).

IV. THERE IS NO CIRCUIT SPLIT CONCERNING THE DISTRICT COURT'S POWER UNDER 28 U.S.C. § 1446(d).

The Court of Appeals was correct in holding that the preliminary injunction was authorized under 28 U.S.C. § 1446(d), and there is no split of authority on that issue.

The Eighth Circuit's holding was entirely consistent with *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), and *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899 (5th Cir. 1975). These cases stand for the proposition that 28 U.S.C. § 1446(d) authorizes a District Court presiding over a removed case to enjoin parallel suits "filed in state court i[n] an attempt to subvert the purposes of the removal statute." *Frith*, 512 F.2d at 901. *Accord Myers v. Hertz Penske Truck Leasing, Inc.*, 572 F. Supp. 500 (N.D. Ga. 1983); *Fischman v. Fischman*, 470 F. Supp. 980 (E.D. Pa. 1979); *Brown v. Seaboard C.L. R.R. Co.*,

309 F. Supp. 48 (N.D. Ga. 1969); *Reliable Transfer Co. v. Gallaher,* 54 F. Supp. 395 (S.D. Ga.), *aff'd,* 145 F.2d 551 (5th Cir. 1944).

The unique factual circumstances of this case leave no doubt as to the proper application of this standard here. Petitioner went out of its way to state, both to the District Court and in the press, that its purpose for filing duplicative state lawsuits was to seek a more favorable ruling from the Kansas courts on an issue already ruled upon by the federal courts. This candid admission was highly unusual and egregious evidence that, as the District Court found, Petitioner's intent in filing its post-removal state-court action was to subvert the court's removal jurisdiction. This finding of fact is beyond challenge and, in any event, is not a proper subject of Supreme Court review. *See United States v. Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.")

V. PETITIONER SEEKS INTERLOCUTORY REVIEW OF A NOW-EXPIRED PRELIMINARY INJUNCTION, AND THE ISSUES IT SEEKS TO RAISE WOULD BE BEST PRESENTED ON CERTIORARI FROM APPEAL OF THE FINAL JUDGMENT.

The decision of the District Court to enter a preliminary injunction, and the Court of Appeals' affirmance, were interlocutory actions. The case continued in the District Court, which entered a final judgment, including a permanent injunction, on July 22, 1996. Under the circumstances present here, there is every reason for this Court to adhere to its "normal practice of denying interlocutory review." *Estelle v. Gamble,* 429 U.S. 97, 114 (1976) (Stevens, J., dissenting).

First, the Petition is a futile gesture because the preliminary injunction from which KPERS appealed is no longer in force. That preliminary injunction ceased to exist when the District Court entered final judgment, in-

cluding a permanent injunction, on July 22, 1996, five days after this Petition was filed. *See Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1977) ("[w]ith the entry of the final judgment, the life of the preliminary injunction came to an end"). Because all of Petitioner's arguments were raised as challenges to the preliminary injunction, all are now irrelevant.[8]

Second, the issues Petitioner seeks to raise can be—and should be—raised on certiorari from the appeal of the final judgment in this case. This Court has a strong policy in favor of granting review "only after a full record is compiled in . . . the District Court followed by statutory appeal to the Courts of Appeals." *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977) (Rehnquist, J., in chambers). Petitioner has noticed an appeal to the Eighth Circuit from the District Court's final judgment, which includes all aspects of this complex litigation, including the conversion of the preliminary injunction into a permanent injunction. Opp. App. at 7a-9a. If Supreme Court review of Petitioner's arguments is ever appropriate, it will be on certiorari from the Eighth Circuit's eventual ruling in that appeal.

There is, moreover, no question of the issues evading review, *see Moore v. Ogilvie*, 394 U.S. 814 (1969), if the instant Petition is denied. Whether the District Court had the power to enjoin parallel state-court proceedings, and the jurisdictional issues Petitioner raised in challenging the injunction, are issues merged into the final judgment, and they will be open to review by this Court, if appropriate, after resolution of the pending appeal.

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[8] Because the Petition would not be worthy of certiorari in any event, the proper disposition is denial of certiorari, *see* Robert L. Stern et al., *Supreme Court Practice* § 18.5, at 724 (7th ed. 1993), or dismissal of the Petition, *see Faulkner v. Jones*, 116 S. Ct. 331 (1995).

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

Respectfully submitted,

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